

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-02419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)
)
)
)
)
)
)

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

July 18, 2013
2:00 p.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3204
Boston, MA 02210
E-mail: vaohara@gmail.com

1 APPEARANCES:

2 For The Plaintiffs:

3 Hagens, Berman, Sobol, Shapiro LLP, by THOMAS M.
4 SOBOL, ESQ. and KRISTEN JOHNSON PARKER, ATTORNEY,
5 55 Cambridge Parkway, Suite 301, Cambridge,
Massachusetts
02142;

6 Ellis & Rapacki LLP, by FREDRIC L. ELLIS, ESQ.,
7 85 Merrimac Street, Suite 500, Boston, Massachusetts
02114;

8 Robinson & Cole, LLP, KIMBERLY A. DOUGHERTY,
9 ATTORNEY, One Boston Place, Suite 2500, Boston,
Massachusetts 02108;

10 Branstetter, Stranch & Jennings, PLLC, by J. GERARD
11 STRANCH, IV, ESQ., 227 Second Avenue North, Nashville,
Tennessee 37201-1631;

12 Lieff, Cabraser, Heimann & Bernstein, LLP, by MARK P.
13 CHALOS, ESQ., One Nashville Place, 150 Fourth Avenue,
North, Suite 1650, Nashville, Tennessee 37219-2423;

14 Law Office of Hugo & Associates, MICHAEL R. HUGO,
15 ESQ., 1 Catherine Road, Framingham, Massachusetts
01701;

16 Crandall & Katt, by PATRICK THOMAS FENNELL, ESQ.,
17 366 Elm Avenue, SW, Roanoke, VA 24016;

18 Law Offices of Mark Zamora and Associates, by
19 MARK ZAMORA, ESQ., 5 Concourse Parkway, Suite 2350,
Atlanta, Georgia 30328;

20 FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS:

21 Brown Rudnick, by DAVID J. MOLTON, ESQ.,
22 Seven Times Square, New York, New York 10036;

23 Brown Rudnick, by JESSICA L. CONTE, ATTORNEY,
One Financial Center, Boston, Massachusetts 02111;

24 Cohen, Placitella & Roth, P.C., by MICHAEL COREN,
25 ESQ., 2 Commerce Square, 2001 Market Street, Suite 2900,
Philadelphia, Pennsylvania 19103;

For the Defendants:

Harris Beach PLLC, by FREDERICK H. FERN, ESQ.,
100 Wall Street, New York, New York 10005;

Hinshaw & Culbertson LLP, by DANIEL E. TRANEN, ESQ.,
28 State Street, 24th Floor, Boston, Massachusetts
02109;

Tucker & Ellis LLP, by MATTHEW P. MORIARTY, ESQ.,
1150 Huntington Building, 925 Euclid Avenue, Cleveland,
Ohio 44115-1414;

Donoghue, Barrett & Singal, P.C., by MICHELLE R.
PEIRCE, ATTORNEY, ESQ., One Beacon Street, Boston,
Massachusetts 02108-3106;

Michaels, Ward & Rabinovitz LLP, by DAN RABINOVITZ,
ESQ., One Beacon Street, Boston, Massachusetts 02108;

Todd & Weld LLP, by HEIDI A. NADEL, ESQ.,
28 State Street, 31st Floor, Boston, Massachusetts
02109;

Lawson & Weitzen, LLP, by RYAN A. CIPORKIN, ESQ.,
88 Black Falcon Avenue, Boston, Massachusetts 02210;

Nelson, Mullins, Riley & Scarborough, LLP, by
DAVID E. FIALKOW, ESQ., One Post Office Square, Boston,
Massachusetts 02109;

Debevoise & Plimpton, LLP, by CARI A. WINT, ATTORNEY,
919 Third Ave, New York, NY 10022;

Donovan & Hatem, LLP, by KRISTEN R. RAGOSTA, ESQ.,
Two Seaport Lane, Boston, Massachusetts 02210;

FOR PAUL D. MOORE, IN HIS CAPACITY AS CHAPTER 11 TRUSTEE
OF NECP, INC.:

Duane Morris LLP by MICHAEL R. GOTTFRIED,
ESQ. and JEFFREY D. STERNKLAR, ESQ., 100 High Street,
Suite 2400, Boston, Massachusetts 02110-1724;

1 INTERESTED PARTY:

2 United States Attorney's Office, by ZACHARY A. CUNHA,
3 ESQ., Suite 9200, 1 Courthouse Way, Boston,
4 Massachusetts 02210

5 Gideon, Cooper & Essary, PLC, by CHRIS J. TARDIO,
6 ESQ., 315 Deaderick St, Suite 1100, Nashville, TN 37238

7 VIA PHONE FOR THE PLAINTIFFS:

8 Marc Lipton
9 Anne Andrews
10 Ben Gastel
11 Bill Leader
12 Bryan L. Bleichner
13 Chris Cain
14 Daniel L. Clayton
15 Daniel O. Myers
16 David J. Rashid
17 David W. Lawrence
18 Douglas A. Mulvaney
19 Douglas D. Small
20 Douglas E. Jones
21 Ed Jazlowiecki
22 Elliot L. Olsen
23 Erin Amos
24 Forest Home
25 Frank J. Federico
 George Nolan
 Greg Lyons
 H. David Gibson
 H. Keith Moore
 Harry M. Roth
 James Girards
 James Stephen King
 Jennifer Crawford
 John Lichtenstein
 John T. Alexander
 John Thornton
 Johnathan Nace
 Johnathan R. Krohnfeldt
 Karen Schaeffer
 Kristine A. Osterday
 Linda Aldon
 Mark R. Dancer
 Mary T. Gidaro
 Meaghan Skillman
 Melvin B. Wright
 Michael Pattanite

1 VIA PHONE FOR THE PLAINTIFFS (CONTINUED) :

2 Mitchell A. Toups
3 Nolan Nicely
4 Patrick Montoya
5 Randy Kinnard
6 Rebecca Blair
7 Rob Briley
8 Robert Randall
9 Rob Sickels
10 Ryan Quinn
11 Scott Sexton
12 Sean Roth
13 Shannon Carey
14 Sharon Houston
15 Stephanie Arndt
16 Steven D. Resnick
17 Terry Dawes
18 Timothy A. Housholder

19 VIA PHONE FOR THE NON-PARTY OBJECTORS :

20 Chris Wolk (NJ)
21 Stephen Grossman (NJ)
22 Kathryn J. Humphrey (MI)
23 Halley Stephens (FL)
24 Alan Bozer (NY)

25

PROCEEDINGS

THE CLERK: All rise. Thank you. Please be seated. Court is now in session in the matter of in re: New England Compounding Pharmacy, Incorporated products liability litigation. This is Case Number 13-MD-02419. Counsel for plaintiffs' steering committee, please identify yourselves for the record.

MR. SOBOL: Good afternoon, your Honor, Tom Sobol for the plaintiffs' steering committee.

02:00PM

MS. PARKER: Good afternoon, your Honor, Kristen Johnson Parker for the plaintiffs' steering committee.

MR. FENNELL: Good afternoon, Patrick Fennell for the plaintiffs' steering committee.

MR. STRANCH: Good afternoon, Gerard Stranch for plaintiffs' steering committee.

MR. CHALOS: Mark Chalos, plaintiffs' steering committee.

02:00PM

MS. DOUGHERTY: Good afternoon, your Honor, Kim Dougherty for the plaintiffs' steering committee.

MR. ZAMORA: Judge, Mark Zamora for the PSC.

THE CLERK: Attorney Lipton, are you on the phone?

MR. LIPTON: I am, Marc Lipton on behalf of the steering committee.

1 THE CLERK: Why don't we start in the middle
2 there.

3 MR. ELLIS: Rick Ellis for the plaintiffs.

4 MR. COREN: Michael Coren, co-chair,
5 official creditors' committee.

6 MR. MOLTON: Good afternoon, your Honor,
7 David Molton for the statutory official creditors'
8 committee.

9 THE CLERK: Mr. Gottfried.

02:01PM 10 MR. GOTTFRIED: Mike Gottfried for the
11 Chapter 11 trustee.

12 MR. STERNKLAR: Good afternoon, your Honor,
13 Jeffrey Sternklar, Duane Morris, also here for the
14 Chapter 11 trustee.

15 THE CLERK: For the defendants?

16 MR. FERN: Your Honor, Frederick Fern from
17 Harris Beach on behalf of liaison counsel for NECC and
18 some of the individuals.

19 MR. TRANEN: Daniel Tranen for NECC.

02:01PM 20 MR. RABINOVITZ: Dan Rabinovitz for Medical
21 Sales Management, Inc. Good afternoon, your Honor.

22 MS. NADEL: Good afternoon, your Honor,
23 Heidi Nadel for Doug and Carla Conigliaro.

24 MR. MORIARTY: Good afternoon, your Honor,
25 Matt Moriarty for Ameridose.

1 MR. THOMAS: Your Honor, Joe Thomas for GDC.

2 MS. KUNDERT: Lisabeth Ryan Kundert for GDC.

3 THE COURT: All right. As usual, we have a
4 number of people on the telephone who I will not ask to
5 identify themselves. All right. This is a status
6 conference in this case. I have the agenda proposed I
7 think yesterday, which I will follow. I think we're
8 going to start with a report on PSC discovery efforts.
9 Mr. Sobol.

02:02PM

10 MR. SOBOL: Good afternoon, your Honor.
11 I'll be tag-teaming with Ms. Johnson on this today. So
12 I'm going to retitile this the discovery efforts and the
13 nondiscovery efforts so the Court understands what's
14 going on and what is not going on.

15 First, in terms of discovery, as you'll see,
16 that there were about 82 subpoenas served on clinics
17 across the country in the past month or so. There are
18 objections that will be heard later that's not at this
19 point in the agenda. That is by and large a summary
20 about what's going on in terms of formal discovery.

02:03PM

21 In terms of informal discovery, now that
22 the -- yes, there were also subpoenas served on several
23 of the national defendants as well that's been brought
24 to my attention.

25 With respect to informal efforts, now that

1 there's a protective order in place, Mr. Fern and NECC
2 have started producing some informal discovery to the
3 plaintiff's steering committee that's also being shared
4 with the creditors' committee, and so that's going ahead
5 well at this point.

6 There is, however, also some nondiscovery
7 efforts that I want to bring to your attention because I
8 think that we'll have to revisit that at the August 9th
9 status conference that's coming up in several weeks.

02:04PM

10 As you recall, your Honor, a fundamental
11 premise of the case management in this group of
12 affiliated actions is that there would be essentially a
13 standing down from discovery with respect to formal
14 discovery against NECC and formal discovery regarding
15 affiliated defendants.

16 From the PSC's point of view, that means the
17 individuals who owned and controlled NECC as well as the
18 19 affiliated corporate defendants and that the premise
19 behind standing down with respect to that formal
20 discovery is that there is an ongoing effort to mediate
21 a resolution with those entities and persons through the
22 auspicious of the trustee of NECC.

02:04PM

23 Those negotiations have been ongoing, and it
24 is our understanding that they continue to be ongoing.
25 We have no reason to think that they aren't, however,

1 it's increasingly coming to my attention that there may
2 be some, one or more of the 19 entities, or their
3 insurers, who are not in a position at this time to be
4 moving forward with a resolution, and if we're not in a
5 mediation or settlement mode with them, then obviously
6 we have to revisit standing down with respect to a
7 discovery stay with respect to them.

8 So what I would expect essentially to be the
9 case on August 9th when we're giving a status to you is
02:05PM 10 we should be giving a status as to whether there is a
11 proposed resolution with the insiders or not because at
12 that point it will be August of 2013, where are we with
13 that, where are we going with that, and also it's
14 incumbent upon me and the PSC to find out whether or not
15 there are some, one or more entities, or insurers of
16 those entities, who are not interested at this time in
17 terms of doing mediation, in which case we'll have to
18 revisit that aspect of case management, so that would be
19 my report with respect to these issues.

02:06PM 20 THE COURT: All right. Does anyone want to
21 respond to that? Anyone from the defense group or
22 trustee?

23 MR. GOTTFRIED: No, I can address that issue
24 I think when we get to the bankruptcy section, your
25 Honor.

1 THE COURT: All right. Anything further on
2 item 1?

3 MR. SOBOL: No, your Honor.

4 THE COURT: Let's go to 2, conduct of
5 discovery order.

6 MS. PARKER: Your Honor, the plaintiffs'
7 steering committee and defendants are in the process of
8 exchanging drafts of an order that would govern basic
9 discovery aspects, including things that may seem to be
10 straightforward, but may, nonetheless, warrant reducing
11 to words on a page, including things like service of
12 subpoenas.

13 We had spoken about service of the subpoenas
14 as well as access to documents produced pursuant to the
15 subpoenas with Mr. Moriarty on this issue this morning.
16 I believe we are working forward and moving ahead on
17 that, but we do expect to present to the Court hopefully
18 before the next status conference a kind of discovery
19 order.

20 THE COURT: All right. Anything else on
21 that topic? Any response?

22 (No response)

23 THE COURT: All right. Item 3, status of
24 bankruptcy proceedings.

25 MR. SOBOL: Why don't I go first, your

1 Honor, and then I'm sure that counsel for NECC and the
2 bankruptcy will also want to add their comments as well.
3 Essentially the matter that is front and center in the
4 bankruptcy is the motion for the entry of a bar date
5 that was filed by the trustee on Friday afternoon,
6 June 28th, a day after the New England Journal of
7 Medicine issued its article about how the diseases in
8 these situations are often concealed for many months and
9 remain a concern about new onsets.

02:08PM

10 This has been the focus of quite a bit
11 attention by the creditors' committee, the trustee and
12 the plaintiffs' steering committee over the past couple
13 of weeks. The matter is scheduled to be heard at this
14 time before Judge Boroff next Wednesday, I think it is
15 on the 24th.

16 The date for filing objections with respect
17 to that bar date is Monday, the 22d. There have been
18 less than a dozen issues that have been trying to be
19 resolved between various people, particularly the PSC
20 and the trustee. We've been meeting recently also to
21 see if we can whittle that down. I'm not sure whether
22 or not we'll ultimately reach a resolution in terms of
23 an agreement about how to proceed, but that's where we
24 are with respect to all of that right now.

02:08PM

25 THE COURT: All right. Mr. Gottfried.

1 MR. GOTTFRIED: Yes, your Honor, thank you.
2 I'll start I guess with the bar date where Mr. Sobol
3 left off. There was a hearing scheduled for originally
4 yesterday, but in order to give the parties an
5 opportunity to continue to try to narrow the issues, the
6 hearing was continued to next Wednesday, the 24th.

7 The parties actually met this morning for
8 two hours at my office to try to make progress, and we
9 believe progress was made. I think at the end of the
02:09PM 10 day, the issues will be narrowed. There may very well
11 be some issues that Judge Boroff will need to take up
12 that are not agreed to by the parties. Obviously the
13 Judge needs to evaluate on his own on the 24th, but we
14 would think that as of that date, the issue will be
15 joined before Judge Boroff, and he'll enter a decision.

16 In terms of the status of the negotiations
17 with the so-called affiliate defendants, today the
18 trustee consented to the filing of a motion to extend
19 the deadlines to August 15th. That is consonant with
02:10PM 20 his view that he --

21 MR. SOBOL: You met October 15th.

22 MR. GOTTFRIED: October 15th, sorry. That
23 is consonant with his view that he is continuing to make
24 progress in those discussions. The trustee also
25 continues to administer the estate I would say in the

1 ordinary course. He's involved in preparing of tax
2 returns, continuing to be involved in product returns as
3 well as collections of accounts receivable.

4 THE COURT: Anyone else want to be heard on
5 the status of the bankruptcy proceedings?

6 MR. MOLTON: Your Honor, David Molton for
7 the committee.

8 THE COURT: Yes.

9 MR. MOLTON: We've heard about the
02:10PM 10 affiliated defendants and the bar date. The committee
11 is working with the PSC and the trustee to alleviate
12 those disputes between them, and hopefully we'll have a
13 resolution by Tuesday. I'm going to be discussing and
14 just bringing the Court up to speed regarding the
15 unaffiliated defendant's proposed mediation program that
16 was part of your Honor's CMO that was entered I believe
17 on June 28th.

18 In accordance, the committee with and in
19 cooperation, in conjunction with the PSC, held a meeting
02:11PM 20 in New York on June 28th with many, many unaffiliated
21 defendants participating either by phone or otherwise by
22 which both committees made a presentation as to what
23 they foresee to be a likely or a contemplated bankruptcy
24 plan by which the nonaffiliated defendants would
25 participate to that plan for the benefit of all the

1 injured parties, and the committee, two committees have
2 been working diligently in accordance with your Honor's
3 CMO on getting a mediation order to your Honor by I
4 think it's July 29th is the deadline, and hopefully that
5 will be teed up in front of your Honor at the
6 August status conference, we can have an entered order
7 and go forward with that.

8 THE COURT: What was the last bit again?

9 MR. MOLTON: Your Honor, pursuant to the CMO
02:12PM 10 that your Honor signed --

11 THE COURT: Right.

12 MR. MOLTON: -- we have until July 29th to
13 offer up --

14 THE COURT: Right.

15 MR. MOLTON: -- the committee, the two
16 committees and the trustee a proposed mediation order
17 for the unaffiliated defendants, and we intend to have
18 that to your Honor by that date and hopefully have that
19 teed up, your Honor, for the next status conference in
02:12PM 20 August so that we can then proceed on that important
21 aspect of this case thereafter.

22 THE COURT: Okay. Thank you.

23 MR. SOBOL: If I may, your Honor.

24 THE COURT: Yes.

25 MR. SOBOL: I should probably map out sort

1 of the two tracks then of what's going on just so you
2 have the clear impression about what unfolds in July,
3 August, September, October.

4 As Mr. Molton just indicated, there is a
5 track of mediation. That track involves both the
6 potential 80-odd clinics that have received subpoenas as
7 well as the national defendants to -- and essentially
8 what we would expect to happen there, as Mr. Molton
9 indicates, we present a mediation order to you in July,
10 a mediation order gets entered in early August.

11 That mediation order may likely have a
12 deadline by which potentially responsible parties, if
13 you will -- if I can borrow that phrase from another
14 area of the law -- decide to opt in or not into the
15 mediation program. There's a deadline for that. We
16 will have a mediator that will be also a part of this
17 package and a mediation time period. I don't know if we
18 really spelled that out, but some time period, call it
19 for the sake of something right now, September,
20 October or whatever, to see if there can be a resolution
21 with those entities.

22 To the extent that an entity, clinic,
23 national defendant has not opted into the mediation
24 program, well then the PSC is going to take up looking
25 at the master complaint and starting a litigation track

1 with respect to those entities, and we currently have a
2 schedule with respect to that which may need some
3 modifications given understandable things that happened
4 over the past couple of months.

5 While that is going on, at the same time
6 there is the trustee's motion for a bar date, which
7 assuming, if it is allowed, then contemplates the
8 publication of notice, the issuance of letters, which
9 will obviously be a big part of the subject you'll deal
10 with in terms of the subpoenas later on in this
11 proceeding, and after that notice period, the date by
12 which the claimants, you know, right now I think it is,
13 as Mr. Gottfried says, you know, October 15th, the date
14 by which people either have signed, filed a claim or
15 not, and then at that point, of course, there would be
16 planned discussions, and hopefully also at that time to
17 have a sense from mediation as to the extent to which
18 there may be nondebtors participating in that plan.

19 That's sort of an overview about how this is
20 all ultimately shaking out right now. You can see that
21 there are many balls that are in the air, and, frankly,
22 every time we sort of look at it, to me, from my
23 perspective we look at it, it's almost like looking at a
24 tangled ball of string. You've got to sort of stare at
25 it awhile to understand how it fits together, and then

02:14PM

02:15PM

1 if you walk away from it, you've got to look back at it
2 again, so, anyway, that's where we are on that. I agree
3 with everything Mr. Molton said about how we're moving
4 forward with that mediation effort.

5 THE COURT: All right. Anything else on
6 that topic? Mr. Gottfried or Mr. Molton, do you want to
7 respond to that last comment?

8 MR. GOTTFRIED: No, your Honor.

9 THE COURT: All right. Item Number 4,
02:15PM 10 liaison counsel for unaffiliated defendants, who's going
11 to take that up?

12 MS. PARKER: So, I concede your Honor, that
13 I was not the person adding that to the agenda, but we
14 do think in particular it would be very helpful to the
15 plaintiffs' steering committee if a liaison were
16 appointed to interact with all of the clinics, doctors
17 and/or healthcare providers that have received subpoenas
18 and some of whom are defendants in this MDL.

19 THE COURT: I can certainly sympathize and
02:16PM 20 understand why you want to deal with one person rather
21 than 89 or 82 or whatever the number is clinics. How do
22 you propose that I go about selecting a person to fill
23 that role? How does anyone propose that I go about
24 doing that?

25 MR. COREN: Your Honor, if I may, I was the

1 person who put that on the agenda, Michael Coren,
2 official creditors' committee.

3 THE COURT: Yes.

4 MR. COREN: And several exercises of having
5 to deal with the defendants begot this, the most recent
6 being the subpoena and the motions. It just seems to be
7 from experience in other MDLs, pharmaceutical cases
8 where you have multiple defendants, it was not uncommon,
9 first of all, that there be a defendant's liaison
10 structure.

02:17PM

11 Obviously everybody would like defendants to
12 organize themselves, so I guess the easy way for the
13 Court to approach that is to order them to do it, okay,
14 come up with their own structure, and if that structure
15 satisfies the concerns and needs of this Court, great,
16 then if not, to reckon back to one of your earlier
17 conferences, This ain't a democracy.

18 There will be times that you'll listen to
19 the parties, and you'll make the decision as your
20 prerogative. What I suggest is that your Honor take and
21 order that, say defendants, the NECC defendants are
22 organized, they're easy to deal with with their liaison.
23 There may be need one or maybe two or three, depending
24 upon if I was to look at it, but in the first instance,
25 I would suggest you let the defendants take a stab at

02:18PM

1 it, just like the plaintiffs were given the opportunity
2 to do it. You had two different groups, two different
3 theories, you may find that they come forward with a
4 very acceptable proposal.

5 THE COURT: All right. Anybody else want to
6 be heard on this? Let me toss out an idea then that I
7 set a deadline for submission of proposals for a liaison
8 counsel for unaffiliated defendants, and once that is
9 ripe, I either follow one or more of the proposals, come
10 up with my own proposal or reject them all and leave
11 things as they are.

12 My sense is that things are -- I wouldn't
13 say they're moving quickly, but there are a lot of
14 things happening at once, and it would be better not to
15 delay this unduly. August 8th provides three weeks in
16 which this could be accomplished. Does that strike
17 anyone as being an unfairly short or unduly long period
18 of time in which to submit proposals? Mr. Sobol.

19 MR. SOBOL: This may be a situation, your
20 Honor, where no one actually steps forward, you have a
21 lot of people who step backwards, and so that date
22 sounds fine, but you just must be prepared yourself with
23 the status conference the next day that we might need to
24 go to a plan B.

25 THE COURT: If the conference is the next

1 day, I'm going to make it August 7th so I have time,
2 which leads to the next question, Mr. Coren, I'm going
3 to look to you since it's your idea. Exactly how do I
4 go about doing this fairly and appropriately if nobody
5 volunteers for the task? How do I decide who is the
6 right counsel, and presumably that counsel's clients are
7 going to have higher costs and so forth, how am I going
8 to pick such a person if no one steps forward?

02:20PM 9 MR. COREN: One, the person -- first of all,
10 one, you've -- I guess they have the common benefit fund
11 on the other side where somebody is going to have an
12 order entered that they keep their hours and get it
13 defrayed, so you might find someone volunteering, but in
14 terms of the beauty contest of it, your Honor will look
15 at what are the categories of defendants you have, you
16 have hospitals, you have pain clinics, you have doctors,
17 and you need a liaison from any one of those particular
18 levels, just, however, when you look at who the parties
19 have entered in here, and we can provide you, for
02:21PM 20 example, from the plaintiffs' point of view how we see
21 the categories are. That could help, and then just, you
22 know, whoever I guess you perceive has the biggest stake
23 in there.

24 THE COURT: I don't even know how I would
25 figure that out, you know, how do I compare a pain

1 clinic in Virginia to a pain clinic in Tennessee to a
2 doctor in Michigan, I don't know who has the biggest
3 stake. I don't know how to figure that out.

4 MR. COREN: Well, I'm sure that if my
5 Brother in Tennessee were here, they would say that
6 there's a hospital called St. Thomas. That might be of
7 interest to them, or Virginia might be looking at there,
8 but if there is a grouping of the states where we know
9 that the interest is there, and perhaps one of those
02:21PM 10 institutions, so you take a look at that from that
11 level. I wish I could give you better guidance, but it
12 would be nice if the defendants were to organize
13 themselves to aid the Court in this.

14 THE COURT: Here's what I'll do as an
15 initial step, and I guess I'll make this up as I go
16 along. August 7th will be a deadline for any group or
17 subgroup of the unaffiliated defendants to propose a
18 liaison counsel structure and anyone else wishing to
19 weigh in by way of a memorandum to the Court which could
02:22PM 20 include any other party or liaison counsel can file a
21 submission, if they choose, but I'll want that by
22 August 7th, and we'll take it up at the August 9th
23 status conference.

24 Anything else on that topic?

25 (No response)

1 THE COURT: All right. Number 5, mechanism
2 for collection and sharing of plaintiffs' medical
3 information, including product I.D.

4 MR. FERN: Judge, this was a topic that I
5 requested to be put on the agenda. We're still not
6 there yet. I spoke with the PSC earlier this morning.
7 They have previously designated two companies which they
8 filed before the Court, a Rust Omni and --

9 MS. PARKER: U.S. Legal.

02:23PM

10 MR. FERN: -- U.S. Legal. My understanding
11 is that U.S. Legal is going to be the repository for
12 non-HIPPA protected information and that Rust Omni may
13 be a likely candidate for the HIPAA-protected
14 information. I don't think the PSC has made a
15 definitive decision as to which way they are going to go
16 there.

17 As I reported to the Court at the last
18 conference, I had also submitted three proposals from
19 three national vendors who basically specialize in the
20 collection and then making those records available via
21 online. I think the PSC, from what I'm told, is still
22 considering those vendors.

02:24PM

23 I just put this on the agenda. The last
24 time, the Judge, the Court said you do not want to
25 micromanage this situation. I appreciate that. Perhaps

1 if we could put this off until the August agenda, we
2 will have a finer resolution, and we'll have a mechanism
3 in place where this process can move forward, and we can
4 start to collect the medical records of these
5 individuals for everybody's availability.

6 THE COURT: All right. Does anyone want to
7 respond? Ms. Parker. Mr. Sobol.

8 MR. SOBOL: Well, that's all perfectly fine,
9 what Mr. Fern says. Two things: Just to make clear
02:24PM 10 that it's Rust Omni, which is the location where
11 information responsive to the subpoena is going because
12 there are some people on the phone, too. We want to
13 just make sure that's clear, Number 1.

14 Number 2, it also should be indicated that
15 many of the plaintiff lawyers are, of course, have or
16 are in the process of acquiring medical information.
17 There are some obviously situations where we might want
18 to hire a common vendor to do that as well, so it's not
19 like the process is stalled, it's just a matter of also
02:25PM 20 having a common vendor, and that is in the process of
21 being taken care of by the committee.

22 THE COURT: Okay. Anything else on that
23 topic? Item 6, pending motions beginning with motions
24 to dismiss Alaunis Pharmaceutical. These motions have
25 been pending for some time, and Carilion, if I'm

1 pronouncing that right, Surgery Center, New River
2 Valley.

3 Who wants to be heard on that? Ms. Parker.

4 MS. PARKER: Thank you. As to the Alaunus
5 motions, your Honor, Alaunus has agreed that we should
6 continue rolling those over from status conference to
7 status conference. There's actually language in the
8 case management order that addresses that more
9 specifically.

02:26PM

10 As to Carilion, I understand that counsel
11 for Carilion may be on the phone. There was discussion
12 about having oral argument scheduled for today on those
13 motions, however, from the PSC's perspective, that
14 particular motion, those specific to a single entity
15 does raise issues that the PSC expect will have impact
16 on many of the other liability claims and will be
17 relevant to both other entities, and plaintiffs in that
18 state as well as may tee up some issues that apply to
19 cases nationwide.

02:26PM

20 So the PSC would request that I guess I'll
21 make this informally because I have not spoken with
22 counsel for Carilion, but, at minimum, that that be
23 marked up for next time so the PSC can respond in the
24 interim, but better, your Honor, would be if motions to
25 dismiss, which you have extended the deadlines for

1 responding to complaints, so we haven't seen many of
2 them, but we would suggest that even those that are
3 filed are dealt with after the plaintiffs file a master
4 complaint in a consolidated and comprehensive fashion.

5 THE COURT: What is the timetable for doing
6 that?

7 MS. PARKER: The master complaint is
8 currently scheduled to be filed on September 15th, I
9 believe. I apologize, September 5th, and Mr. Fennell
10 has informed me that counsel for Carilion has agreed
11 that the motion to dismiss be heard later following the
12 amended complaint.

13 THE COURT: After September 5th?

14 MS. PARKER: Correct.

15 THE COURT: All right. I don't have a
16 problem with that, but let me just offer some thoughts.
17 The first is a motion to dismiss by definition is an
18 indication that the defendant thinks that they shouldn't
19 be a part of these proceedings, which, of course, costs
20 money and time and attention, and I ought to try to
21 resolve those early on, particularly, I mean, by
22 definition, they should involve issues of law, not
23 issues of fact, and it's not clear to me that we need to
24 take up everyone's time if we get to this point with
25 individual motions to dismiss, with individual

02:27PM

02:28PM

1 defendants.

2 You know, it may affect one case out of
3 many, and it could be that we set aside a day other than
4 the big status conference to argue some of these issues,
5 but I guess for the time being, I will roll those over
6 at least until the next status conference, and we'll
7 continue to discuss what the plan is for doing that.

8 I also don't like having unresolved motions
9 pending for long periods of time either, which is
02:29PM 10 perhaps silly on my part, but I feel like at some point
11 I ought to address them and one way or the other move
12 on, but at least for now, we'll roll over those motions
13 until the next status and presumably till after
14 September 5th.

15 All right. Motions opposing the case
16 management order, which is 6b. My understanding of this
17 is several, and I think the unaffiliated defendants all
18 were unhappy with the case management order in several
19 respects, either because the discovery deadlines were
02:29PM 20 seen as too aggressive or unfair or that mediation
21 proposals or the process of modifying the CMO in some
22 way treated them unfairly.

23 It's not clear to me which of these issues
24 remain live or not. It's certainly not my intention to
25 treat any party unfairly. A deadline is the easiest

1 thing to deal with. If a deadline doesn't work, you can
2 always extend it, but I'm not quite sure what to do with
3 this. My instinct is to deny the pending motions
4 without prejudice since the CMO has issued, and the
5 landscape has changed somewhat without prejudice to
6 their renewal after perhaps an opportunity to consult
7 with the PSC and with the affiliated defendants and see
8 if it can't be worked out, but I don't know if that
9 makes sense or not.

02:30PM

10 Who wants to take the lead? And is there
11 someone on the telephone? I think we have -- I will try
12 to reconstruct. I know there's some lawyers from
13 Tennessee who wanted to take this issue up who had not
14 filed a motion to intervene. Well, let me first hear
15 from the PSC. What's your reaction? Let's start there.

16 MS. PARKER: We think that's a very workable
17 situation. Your Honor, we remain more than willing to
18 discuss any lingering objections or concerns about the
19 CMO with any of those parties that have filed these
20 motions.

02:31PM

21 THE COURT: Again, you don't have to resolve
22 them, but some of this I think are issues that either
23 didn't occur to me or in the process of revising the CMO
24 fell by the wayside perhaps accidentally, and I
25 certainly don't want to treat anyone unfairly. Let me

1 recognize, are Attorneys Tardio or Cline from Tennessee
2 on the phone? Okay, in person, yes.

3 MR. TARDIO: Chris Tardio from the national
4 bar.

5 THE COURT: Yes. Welcome to the cool north,
6 Mr. Tardio.

7 [Laughter]

8 MR. TARDIO: Well, I think it's hotter here
9 than it was when I left.

02:32PM 10 As your Honor recognized, we didn't actually
11 file an opposition. Since I represent five Tennessee
12 defendants or Tennessee parties, we're nonparties, so we
13 were unable to file an opposition to the case management
14 order formally.

15 THE COURT: Can you speak into a mic. so
16 that people on the phone can hear you. Yes, go to the
17 podium. Thank you.

18 MR. TARDIO: We, at this point, as I stand
19 in front of the Court now, all five of my clients,
02:32PM 20 Surgery Center of Crossville, Chatanooga Neurosurgery &
21 Spine, Dr. Don Jones, St. Thomas Outpatient Neurosurgery
22 Center and Specialty Surgery Center of Crossville, if I
23 didn't mention them, are all nonparties so we were not
24 able to file a formal objection, but our objection, had
25 we had been able to file it, was primarily with the

1 aggressiveness of the discovery deadlines, and we
2 adopted opposition that had been filed previously by
3 actual parties in the MDL who may or may not be on the
4 phone.

5 THE COURT: All right. Stephen Grossman
6 from New Jersey, are you on the phone?

7 MR. GROSSMAN: Good afternoon, your Honor, I
8 am on the phone. I appreciate the opportunity to be
9 heard. Our concerns more so beyond the scope of the
10 deadlines had to do with the fact that the CMO may have
11 ordered certain procedures or certain elements within
12 the CMO with respect to the mediation requirements and
13 the native file requirements of the electronic discovery
14 order.

15 Although the PSC is seeking to submit those
16 orders, the preview that they placed into the CMO, we
17 were concerned that that was actually being ordered by
18 the Court, so to the extent that those provisions,
19 particularly the native file requirement for production
20 of any documents going forward, isn't part of the order
21 or has not been ordered by the Court and will be dealt
22 with the ESI protocol that we have yet to see, then that
23 objection can be worked out.

24 THE COURT: All right. And Attorney, is it,
25 Wolk? I'm sorry.

1 MR. GROSSMAN: We do agree with the
2 gentleman who just spoke with respect to some of the
3 clinics in Tennessee. We, as well, believe that the
4 deadlines set forth in the case management order are
5 incredibly aggressive, and we do not believe that the
6 case warrants that type of fast case management in this
7 case, particularly with the number of parties and
8 defendants.

9 We also feel that being stuck with those
02:35PM 10 particular deadlines would also prejudice us in terms of
11 the discovery that we would seek not only as to the
12 plaintiffs but also to co-defendants as well as
13 third-party defendants we have yet to bring in.

14 THE COURT: All right. Attorney Wolk, I
15 think it is from New Jersey, do you wish to be heard?

16 MR. WOLK: Yes, your Honor, thank you. This
17 is Christopher Wolk from the office of Jay Blumberg. We
18 represent Premier Orthopaedics and Dr. Smith-Martin here
19 in Vineland, New Jersey. I really have very little to
02:35PM 20 add to what Mr. Grossman has already said to your Honor.

21 I agree that the deadlines are very
22 aggressive in this instance, however, given what has
23 already been discussed here today, particularly
24 regarding a liaison to the unaffiliated defendants, this
25 may be something that we could work out with the PSC

1 moving forward to extend some of those deadlines as we
2 discuss it a little bit further.

3 My main objection, your Honor, to the case
4 management order are the deadlines are very aggressive,
5 and I don't see how realistically we could conduct the
6 deadlines within the deadlines.

7 THE COURT: All right. Did I miss anyone on
8 the telephone who wanted to be heard not on the
9 subpoenas but on opposition to the case management
10 order?

02:36PM

11 (No response)

12 THE COURT: All right. Here's what I'm
13 going to do. The current pending motions, which
14 according to the agenda, and I think that's correct,
15 docket numbers 188, 189, 201, 210, 223 and 226 are
16 denied without prejudice to their renewal.

17 I'm going to direct the objecting parties to
18 meet and confer with the PSC and any other relevant
19 party to attempt to negotiate a satisfactory solution,
20 and you can either file a new motion or we can take it
21 up on the agenda for the August 9th conference, and
22 we'll handle it that way, and if someone needs emergency
23 relief from a deadline, I'll certainly consider
24 providing it. I want to be mildly aggressive but not
25 extremely aggressive on deadlines, how about that?

02:36PM

1 All right. The next item on the agenda is
2 requests for preservation of evidence, which I think
3 various -- there were four more or less identical ones
4 where the response was from the government and from the
5 trustee. Does anyone want to be heard on those? Is
6 anyone here present? I think it's for the individual
7 defendants. Yes, I'm sorry, Ms. Peirce.

8 MS. PEIRCE: I had a limited appearance in
9 this case early on, which is why I'm sitting.

02:37PM

10 THE COURT: Speak at the podium and identify
11 yourself for the record. Thank you.

12 MS. PEIRCE: Michelle Peirce on behalf of
13 Barry and Lisa Cadden individually. As I said, I have
14 had a limited -- and Bruce Singal and I both represent
15 Lisa and Barry Cadden. We filed limited appearances in
16 this proceeding because our clients are represented
17 currently by Mr. Fern, so I'm just identifying myself in
18 response to your question that we did file one of the
19 statements in response to the preservation order, and
20 I'm present if you need to hear from me, but I don't
21 need to be heard beyond what we filed.

02:38PM

22 THE COURT: All right. It's not clear to me
23 whether any action is required on my part. The last
24 time I think this topic came up, as I understood it, the
25 trustee was seeking to dispose of pieces of equipment

1 and other property as to which there were leases that we
2 wished to avoid, and I was assured, as I recall, that
3 there were no kind of information present, data or
4 things of that nature that was in any danger of being
5 destroyed.

6 It's quite an abstract question to me
7 whether someone, either to defend themselves in one of
8 these proceedings or in a criminal proceeding, which I
9 probably don't have jurisdiction over, needs to preserve
10 a particular item of equipment.

02:39PM

11 Someone, the trustee, I think said either if
12 you want to keep a particular piece of property, you
13 need to take custody of it and pay to store it or
14 whatever it is, that this can't go on forever, but I
15 think there's at this point nothing for me to do.

16 Mr. Gottfried, do you want to respond?

17 MR. GOTTFRIED: Yes, your Honor, I think the
18 order worked as you set it up. Unless you modify it in
19 response to the objections, then it will be effective,
20 and what will happen is if a lessor wants to pick up a
21 piece of equipment, for example, the water cooler, the
22 postage meter, the Xerox machine or some other piece of
23 equipment that has been scheduled on the list, they'll
24 be able to do that absent you changing that status quo.

02:39PM

25 So if you do nothing to modify the order in

1 response to the preservation request, I believe the
2 lessors, who have been specifically identified, will be
3 free to pick up their equipment. To the extent there is
4 something that has not been scheduled, there is a
5 procedure for providing notice to certain parties which
6 would then be followed if there's an additional item
7 that the trustee needs to dispose of, but I think if you
8 do nothing, the order goes forward as it was
9 contemplated, your Honor.

02:40PM

10 THE COURT: All right. To use the example
11 of a Xerox machine, I have no idea how a modern
12 photocopier works, but if there's some chip in there
13 that stores and records data what's being photocopied
14 and one of the individual defendants think that that's
15 important to preserve, by all means, let's take steps to
16 preserve it, otherwise I don't see why these machines
17 need to be kept or stored, or at least if someone wants
18 to do it, they'll have to make arrangements and pay for
19 it, so at present I'm going to leave matters as they
20 stand.

02:41PM

21 Is Mr. Cunha present? Does the government
22 want to -- yes.

23 MR. CUNHA: Yes, your Honor, unless the
24 Court has any specific questions for the government, I
25 think we've laid out our position. Again, we were in

1 the anomalous position of being a nonparty here, and
2 this was really an abundance of caution measure to make
3 sure that anyone who was not a party to the
4 multi-district litigation who might conceivably have an
5 interest could bring that interest forward and raise it
6 with the Court.

7 Since no one has stood up for any of the
8 individuals who has filed an objection, it's not my
9 place to advocate for them. I would note that there is
10 some generalized language in the filings that they made
11 requesting the preservation of property, but I think
12 that without more, it's very hard to understand exactly
13 what that might mean or how that might go forward, and I
14 certainly think that the trustee has raised very valid
15 points about the expense of maintaining property that is
16 not subject to the preservation order any further.

17 THE COURT: All right. Just to be clear, if
18 I haven't said this in the past, when I'm permitting
19 someone like Ms. Peirce or Mr. Cunha to speak, I may not
20 be saying it every time, but I'm permitting them to
21 speak to educate the Court. I don't deem them to have
22 either entered an appearance or consented to
23 jurisdiction or anything of the sort, and for that
24 matter, private parties can intervene for a limited
25 purpose of asserting a particular interest and a

1 particular issue.

2 All right. Unless there's anything else on
3 that, 6D, the Virginia plaintiffs' motion seeking
4 interlocutory appeal or to alter judgment. This is the
5 motions in the memoranda are 195, 196 and 211, 212.

6 The trustee and the unsecured creditors, I'm
7 sorry, the creditors' committee have opposed those
8 motions. I can deal with this very quickly, I think. A
9 motion for reconsideration to the extent that it is a
10 motion for reconsideration normally requires a decision
11 that's clearly erroneous, and that would work a manifest
12 injustice.

02:43PM

13 Just to review what I did, as to state court
14 cases involving state court claims against state court
15 defendants with no claim against NECC or related party,
16 I assumed, without deciding the existence of subject
17 matter jurisdiction, and abstained as a matter of
18 discretion.

19 Ordinarily, of course, the Court has to
20 decide subject matter jurisdiction in the first
21 instance, and I saw no reason here to decide that when I
22 would abstain, in any event, as a practical difference,
23 I don't see any practical difference between the two.

02:44PM

24 I left open the possibility that there would
25 be -- could be a different ruling under different

1 circumstances. Certainly if a defendant in one of those
2 cases files a claim for contribution or indemnity
3 against NECC, it certainly raises the possibility that
4 "related to" jurisdiction may attach, but by definition,
5 these are cases in which there is no claim against NECC
6 or related entity.

7 The Virginia plaintiffs indicated, among
8 other things, that a defendant under Virginia law has no
9 right of indemnity if they were actively negligent. I
02:44PM 10 don't think I need to decide any of these issues at this
11 point.

12 The real point from my perspective is that
13 these Virginia plaintiffs have achieved what they
14 wanted. It may not be as permanent as they want, but I
15 did not transfer any state court cases involving only
16 state court claims and state court defendants if there
17 was no claim against NECC or related entity, and so they
18 have in effect won.

19 They've asked me to certify this for an
02:45PM 20 interlocutory appeal under Section 1292(b). To the
21 extent I abstained 28 U.S.C., Section 1344(d) I think
22 bars an appeal from an abstention decision in a
23 bankruptcy case, but, again, in any event, these
24 plaintiffs were successful.

25 The facts may change in the future, but at

1 this point I see no reason either to alter my order or
2 to certify an interlocutory appeal, and if a bar date
3 gets set and some of these defendants elect to file a
4 contribution or an indemnity claim, we may well revisit
5 some of these cases, but, for the present, I see no
6 reason to do so or to otherwise address or revise what I
7 did or to permit an interlocutory appeal, assuming I
8 have the discretion to do so, and so those motions will
9 be denied.

02:46PM

10 Is there anything further on those issues?
11 Are Virginia counsel on the phone? Do you wish to take
12 anything else up?

13 (No response)

14 THE COURT: I don't hear anything.

15 MR. SEXTON: No, your Honor, this is
16 Scott Sexton in Roanoke, Virginia. We had anticipated
17 and I think agreed with counsel for the trustee that
18 that would be argued at the next status conference. I
19 think you've addressed it.

02:47PM

20 THE COURT: All right.

21 MR. SEXTON: Perhaps that's not necessary.

22 THE COURT: All right. This may not be the
23 last of these issues, but that's where we are today,
24 July 18th.

25 All right. Next up, 6E is ARL's motion for

1 a protective order. Mr. Ellis.

2 MR. ELLIS: Yes, I have been negotiating on
3 behalf of plaintiffs' group, ARL. We're going to push
4 this motion over.

5 THE COURT: Can you speak into the mic. so
6 everyone can hear you, sir.

7 MR. ELLIS: We've been meeting and
8 conferring with ARL, and we're going to hold this over
9 to the August 9th hearing, and hopefully we won't have
10 to deal with it.

02:47PM

11 THE COURT: Anyone else want to be heard on
12 that?

13 (No response)

14 THE COURT: That will be held over to the
15 next status for August 9th.

16 All right. Item 7 are responses to the
17 PSC's subpoenas. 7A is mechanism for access
18 information. I'm not sure I know what that means.

19 MS. PARKER: I think it's misplaced, your
20 Honor, but, as I understand it, the defendants wanted to
21 make sure that we had addressed adequately how they will
22 be accessing information that is produced pursuant to
23 the subpoenas. Let me stop for a minute and make a
24 distinction. I think Mr. Sobol helped to clarify this
25 earlier, but so everyone on the phone understands and

02:48PM

1 the Court understands, documents that are produced
2 pursuant to subpoenas issued, in particular, to clinics,
3 doctors or healthcare providers, falls into two camps.
4 Some of what has been sought pursuant to those subpoenas
5 is protected health information. Anything that falls
6 into that bucket is going to be sent to Rust Omni, who
7 is the vendor identified by the plaintiffs' steering
8 committee, who is a HIPAA-qualified and compliant
9 vendor, who will hold onto, do nothing with yet, but
10 hold onto and receive that information.

02:48PM

11 Separate from the HIPAA or
12 healthcare-protected information, you have ordinary old
13 discovery, so all discovery other than HIPAA goes to
14 U.S. Legal, who we also have identified to the Court and
15 to the defendants to receive that information.

16 U.S. Legal is setting up a single repository
17 that will be available and accessible to both plaintiffs
18 and defendants. We're working through the process with
19 U.S. Legal of making sure that we have appropriately
20 cordoned off particular materials, there's no work
21 product concerns and that everyone has access. That
22 process we hope to have up and running very soon.

02:49PM

23 And I will make, if I may, your Honor,
24 unless defense counsel have any comment to that, I would
25 make one, two corrections or addendums to the list of

1 objections that's included in the subpoena.

2 As I understand it, Number 8 and 9, Erlanger
3 Health Systems and HCA Health Services, those objections
4 are in the process of being resolved. The plaintiffs
5 and the recipients are conferring on those, and I
6 understand there's no need for the Court to address
7 those particular objections today. The same goes for
8 Liberty Industries, I understand that that need not be
9 taken up today either.

02:50PM 10 THE COURT: All right.

11 MS. PARKER: With that, I will turn -- well,
12 back to the Court, of course.

13 THE COURT: Let me dispose of an issue that
14 cuts across all the subpoenas, which I think is the
15 easiest issue of all, and that is jurisdiction or
16 authority. I concluded that I had the authority both to
17 have the subpoenas issue out of this Court and to have
18 centralized enforcement.

19 28 U.S.C., Section 1407(b) provides that I
02:50PM 20 can exercise the powers of a district judge in any
21 district. The statute literally says for the purpose of
22 conducting pretrial depositions, and there is authority
23 to the effect that that includes document subpoenas as
24 well, there being little practical difference between a
25 document subpoena and a keeper of the records deposition

1 with a subpoena duces tecum.

2 I issued an order providing for that
3 centralized enforcement. I think that decision is
4 correct as well as practical. I think I have the
5 authority under the statute to do it, and to that
6 extent, on any of these motions, objections to the
7 jurisdiction or authority of the Court is going to be
8 denied.

9 I have one set of broad -- let me, I'm
02:51PM 10 getting ahead of myself here. What I expect to do on
11 these is to talk about one overarching issue that I
12 think cuts across most or all of these subpoenas, and
13 then to the extent that there are other issues
14 concerning relevant scope, breadth, defects in service,
15 time for responses, so forth, that haven't been
16 resolved, I'm going to refer them to the magistrate
17 judge, but I want to take up first this broader issue,
18 and that is the question of subpoenas seeking
19 information from pain centers or clinics or physicians
02:52PM 20 who are not parties, who don't have patients who are
21 parties where there is no claim presently pending by a
22 patient of the clinic or pain center or physician.

23 In other words, some of the providers have
24 said, look, you're seeking information protected by the
25 physician or patient privilege as well as HIPAA

1 information. It's privileged, it's confidential, it's
2 not relevant. What you're looking to do is to create a
3 list of names so that you can provide notice in the
4 bankruptcy action. That's not an appropriate use of a
5 subpoena in a case of this nature. That's sort of the
6 basic issue I would like to discuss, and I think I
7 understand the recipient's point of view. I'd like to
8 hear from whoever wants to take it up for the
9 plaintiffs' committee to address that issue.

02:53PM

10 MR. FENNELL: Your Honor, I'm
11 Patrick Fennell, and I'm from Crandall & Katt, Roanoke,
12 Virginia. I'm on the plaintiffs' steering committee.
13 I'll address those concerns, and I'd like to begin by
14 discussing some of the accommodations that the
15 plaintiffs' steering committee has decided to make after
16 we got -- after we received a lot of these objections
17 and motions to quash, the plaintiffs' steering committee
18 took those very seriously and met and discussed them,
19 and we have decided to make three very significant
20 accommodations in terms of narrowing the scope of the
21 discovery that is being sought in these subpoenas.

02:54PM

22 The first significant step is that we're
23 reducing the scope of the documents that we're actually
24 seeking to discover by basically defining the documents
25 by those patients who were identified by the clinics as

1 having received an injection or some kind of application
2 of a medication that was identified by the CDC as having
3 being contaminated.

4 So, if it's an injection of the MPA, if the
5 clinics will identify those patients of theirs who
6 received an injection of MPA that was identified as
7 contaminated, like from a contaminated lot, we're
8 seeking that information, the identity of those
9 patients.

02:55PM

10 If it was eye drops, for example, one of the
11 other three drugs that the CDC identified as
12 contaminated, we're looking for the names of the
13 patients who received contaminated eye drops. So by
14 limiting the scope of the request for information about
15 patients to just those who actually received the
16 contaminated medications, we're very narrowly tailoring
17 the request to meet the needs of probably notice
18 requirements for the bar date and so forth, and we
19 understand that that may include some clinics who don't
20 know of any plaintiffs that are patients of theirs.

02:55PM

21 They may feel like they don't have any
22 -- they haven't been named in any lawsuits yet and that
23 sort of thing, but in order to we think satisfy the due
24 process requirements of a notice and a bar date-type
25 situation, we have to undertake reasonable steps to

1 identify all of those patients who are either known or
2 reasonably renewable, so that's why we're asking for
3 those. That's the first accommodation that the PSC is
4 offering to the recipients of the subpoenas.

5 The second one is that we have agreed to
6 change the date by which the recipients have to respond
7 to the subpoenas provided they are agreeing to produce
8 documents on a rolling basis. We've changed the date
9 for responding to the subpoenas and producing the
02:56PM 10 documents to August 15th to give them more time to go
11 through their records and produce the information we're
12 requesting. And a third significant accommodation, it
13 has to do with the depositions, the subpoena, the
14 standard subpoena that was sent out included a notice of
15 deposition for a records custodian-type of deposition,
16 and the plaintiffs' steering committee has determined
17 that we will by and large adjourn those depositions, and
18 we won't even conduct them unless it really becomes
19 necessary because the clinic is not providing the
02:57PM 20 documents we need and that sort of thing.

21 THE COURT: All right. Let me go back to I
22 guess the purpose of collecting this information, and I
23 don't -- I understand the practical reasons for doing it
24 this way, but I have to start with the legal reasons,
25 whether it's permissible or not.

1 We have this bankruptcy proceeding, which is
2 proceeding in parallel to this. The expectation is that
3 a bar date will be set, that it will be on some
4 reasonably close horizon and that notice will have to be
5 sent.

6 I had understood that the notice required in
7 a bankruptcy proceeding is to known creditors and
8 otherwise publication notices permissible, but, in any
9 event, the PSC wants to go farther and to try to send
02:58PM 10 what I understand is individualized notice to people who
11 may be effected.

12 Even assuming that that's a good idea and a
13 fair idea, isn't it appropriate use of the subpoena
14 power in this litigation, I'm struggling to come up with
15 an analogy here where this sort of thing has happened
16 before and has been permitted is relevant from a
17 nonparty.

18 Those of you on the phone, we're getting
19 feedback. My words are coming back to me. Thank you.
02:59PM 20 Don't put me on speaker. Thank you.

21 All right. This is not a class action,
22 right, so we have a specific universe of patients who
23 are plaintiffs in this case, these cases, they have
24 filed a lawsuit, and in the ordinary course, they're
25 entitled under Rule 26 to information that's relevant to

1 their claims or reasonably calculated to lead to the
2 discovery of admissible evidence, and the defendants are
3 entitled, of course, to likewise obtain that kind of
4 information, including information from third parties.

5 But here what we're doing is using the
6 subpoena power to compile a list really, I mean, you're
7 looking for other information, but I'm focused at this
8 point on the list, and I'm troubled as to whether
9 that -- in any event, I'm troubled by whether or not
03:00PM 10 that's appropriate or permissible, then we have some
11 other layers to the problem.

12 The subpoenas do seek health information,
13 which is normally protected by physician-patient
14 privilege. The plaintiffs who have sued, of course,
15 have implicitly waived that privilege as to their
16 claims, but the people who are not parties or are not
17 plaintiffs have not.

18 HIPAA is, of course, a layer, and particular
19 states may have their own additional requirements for
03:01PM 20 how privileged material is handled. I confess, I don't
21 know how that works, but some of the papers have alluded
22 to additional requirements, balancing tests and so forth
23 to overcome the privilege.

24 Let me start with the basic question. Is
25 this an appropriate use of the Rule 26 and subpoena

1 power? Can we do this? Is this legal?

2 MR. FENNEL: Your Honor, I think the answer
3 is yes because what the PSC is trying to do is tailor
4 the document requests, the information requests as
5 narrowly as possible to satisfy the need for
6 information.

7 At this point, as I indicated, the PSC is
8 trying to identify who present claimants might be but
9 also who -- what other claimants might be out there, in
03:02PM 10 other words, the known claimants now and the reasonably
11 knowable claimants, that the problem with the clinics
12 and other parties relying on this idea, that all of the
13 claimants have been identified because of this reporting
14 set up by the Centers For Disease Control doesn't
15 account for a lot of potential injured parties out
16 there, and the reason I say that is for a couple of
17 reasons:

18 Number 1, the instances of injuries that are
19 being reported by the Centers For Disease Control
03:02PM 20 include people who have received a diagnosis of
21 meningitis. There are all kinds of different ways of
22 getting a diagnosis of meningitis, and there are
23 different standards out there, which is largely due to
24 the fact that the state of medicine in terms of
25 diagnosing a fungal infection is fairly new.

1 It's in its infancy compared to what we know
2 about bacterial infections, so the finish line or the
3 goal line for identifying a fungal infection has moved
4 just since this case began.

5 The other instance is that there are lots of
6 people out there, I know myself, I know lots of other
7 lawyers who represent people who never got a diagnosis
8 of fungal meningitis in a formal sense but they suffered
9 a lot of symptoms which are very consistent with a
03:03PM 10 fungal meningitis diagnosis, but they never got reported
11 to the CDC because they never officially got that
12 diagnosis, so there are potentially lots of people who
13 are out there, probably hundreds, at least, who are not
14 on the chart or not on the grid as far as the CDC is
15 concerned for various reasons but we feel will be
16 entitled to some kind of notice if there's a bar date
17 imposed and that sort of thing.

18 THE COURT: Again, let's go to the practical
19 issues as to why you want to do it, and, of course, no
03:04PM 20 matter what the system is, there's always going to be
21 people who don't become aware of that they may have a
22 claim and lots of people who are aware they have a claim
23 but choose not to exercise it.

24 Am I not being asked to permit this in order
25 to support the notice function of the bankruptcy court

1 once a bar date is set? Can't this matter be handled by
2 the bankruptcy court? What powers does the Court have
3 to effectuate the best possible notice under the
4 circumstances or the fairest possible notice?

5 MR. SOBOL: If I may, your Honor.

6 THE COURT: I'm sorry.

7 MR. SOBOL: In addition to what Mr. Fennell
8 has indicated?

9 THE COURT: Yes.

03:05PM

10 MR. SOBOL: I think that this goes -- the
11 answer to the legal question and the practical question
12 is that this goes to the heartland of the purposes and
13 the obligations of the plaintiffs' steering committee,
14 the creditors' committee and this Court to protect the
15 interests of people whose rights are going to be
16 affected by this proceeding and the bankruptcy
17 proceeding.

03:05PM

18 I'm going to take a step back and explain
19 how this kind of thing has happened previously and then
20 draw the analogy between those prior proceedings and
21 this one. The first time that this kind of a project
22 was engaged in that I'm aware was in front of
23 Judge Young in the Relafen case where he was not
24 satisfied -- it was a class action case, I recognize,
25 all these cases I'm about to describe are class actions,

1 I'll draw the analogy to you in a moment -- where the
2 usual publication notice goes out, and you get 4,000
3 claims of consumers nationwide, and that's not adequate,
4 and instead, he said, that this Court has the power and
5 the obligation to ensure the interests of the members of
6 the class, it has a fiduciary duty to make sure that
7 people really know about what's going on and really have
8 a genuine opportunity to file a claim.

03:06PM 9 So he ordered the plaintiffs' lawyers, of
10 which I was one, to go out and subpoena pharmacies and
11 PBMs, get healthcare information that is privileged and
12 highly sensitive, but do it under the same kind of terms
13 we've done it, get it to Rust, the same company that
14 we've done here, so that they could deduce names and we
15 could write checks to those people with an indication
16 that you're entitled to this money, and instead of it
17 going to 4,000 people, the checks went out to over a
18 quarter of a million or 350,000 people or something on
19 that order.

03:06PM 20 That process that I've just described was
21 then adopted by Judge Saris where we sent out notices to
22 over a million Medicare patients, written notices to
23 make sure that they got -- because Judge Saris thought
24 it was her obligation as well as the plaintiffs'
25 obligation, not only power but obligation to make sure

1 the people have actual notice of their rights.

2 THE COURT: Is that a class action?

3 MR. SOBOL: These are all class action cases
4 I'm giving you.

5 THE COURT: But, of course, a class action,
6 there's a specific provision in the rules for members to
7 the class, and that strikes me that's a horse of a
8 different color, that's what I'm struggling with.

9 MR. SOBOL: Let me draw the analogy then
03:07PM 10 here, although there are other examples, I think I don't
11 want to beat that dead horse for a moment, and I'll see
12 if I can also show you how they are the same colors of a
13 horse.

14 So here in this situation, the reason you
15 have the hooks, if you will, are twofold: First, you do
16 have class actions before you, not just my office but
17 other offices have filed class actions, and you have the
18 power under those class actions to issue orders and
19 effectuate subpoenas to the members of those class.

03:08PM 20 You recall in the very beginnings I have
21 filed and other people have filed class actions saying
22 we have a limited fund here, we have these people in the
23 United States, they need and they're entitled to
24 genuine, honest notice, that if you don't file a claim,
25 your rights are going to be wiped out and that they

1 should have an equitable process of distribution, so
2 you, yourself, regardless of any bankruptcy, have a hook
3 to do that in this MDL.

4 But, second, what's going to happen in the
5 bankruptcy, what's happening with the bar date notice
6 right now is for all practical purposes and legal
7 purposes is exactly a class action. It's treating all
8 of the victims in the country as if they have a right to
9 file a claim, and if you file a claim, you're in, and if
10 you don't file a claim, you're out. There is no
11 difference.

12 It's de facto a class action right now, and,
13 in fact, that's what's often argued in bankruptcy court
14 is that you no longer need a class action because we're
15 treating everybody like they're in a class.

16 Now, if there's a distinction because I
17 think that only carries that second explanation only
18 takes us nine-tenths of the way because then you'd be
19 saying, well, why don't you bring this issue to
20 Judge Boroff rather than to me, and that's a question
21 that we also looked into as well.

22 There what we tried to say is, well, where
23 is this going to most efficiently be done? The nearest
24 we could tell in a bankruptcy court did not have the
25 power to issue subpoenas nationwide and insist upon

1 central enforcement.

2 Now, that may or may not be a correct legal
3 conclusion, but it was explored jointly among people,
4 not just the PSC but others, and we came to the
5 conclusion that the more efficient way to approach this
6 would be to have the MDL Court do it because we could
7 have central enforcement.

8 Now, finally, I'll so just we can get beyond
9 what I would consider to be the final small technical
03:10PM 10 gap that has to be closed, which is sure, okay, it's
11 more practical here, Mr. Sobol, but I'm still not the
12 bankruptcy court, I'd say, well, you can issue an order
13 that for this tiny, small purpose, the reference is
14 withdrawn, and you're sitting not only as a Federal
15 District Court Judge but also as the Bankruptcy Court
16 Judge and everything is taken care of.

17 Now, that's only the answer to the legal
18 question, but I'll also say the fairness question in
19 this situation, this is not a common situation where
03:10PM 20 you've got a bankruptcy that's dealing really with a
21 mass tort and where it is fundamental to the purposes of
22 not just the PSC and the creditors' committee but to you
23 and to Judge Boroff to make sure that everybody gets as
24 clear an opportunity to file a claim before their rights
25 get wiped out, particularly where we've got 60 or so

1 dead Americans and 700 and whatever, you know, illnesses
2 as well as other potential claims that are out there,
3 this can't be dealt with by -- well, that's why we're
4 doing this.

5 So I think you've got the hooks for those
6 reasons and why it is it's practical to do it and why
7 it's, frankly, I don't think it's a matter simply that
8 you have the power, I think you have the obligation,
9 frankly.

03:11PM

10 THE COURT: What about the issues of
11 physician-patient privilege, which are matters
12 presumably of individual state law? Why does -- how is
13 that privilege overcome that a plaintiff, a resident of
14 New Hampshire, let's say, who went to a pain clinic, put
15 HIPAA aside, but it covers more or less the same
16 ground, how does that privilege get waived or overcome?

17 In other words, you're asking me to ask a
18 New Hampshire pain clinic or Virginia pain clinic to go
19 through its record and say patient X received treatment
20 Y on such-and-such a date, and, therefore, patient X,
21 you know, we're going to give you that information,
22 including that patient's contact information, so that
23 you can contact that patient. What about -- why is that
24 not privileged and how do we overcome the privilege?

03:12PM

25 MR. FENNELL: Your Honor, this is

1 Patrick Fennell, and if it pleases the Court, I'll
2 address that concern.

3 Earlier in this case, the Court entered the
4 qualified protective order which set out the procedures
5 by which the protected health information would be
6 received by the plaintiffs' steering committee pursuant
7 to the discovery efforts that it undertook, and in your
8 Honor's order, you required that the protected health
9 information be kept in the strictest confidence and
03:13PM 10 would not be released to any other person or entity
11 until further order of the Court.

12 Pursuant to that order --

13 THE COURT: I was focusing on HIPAA frankly
14 at the time, not privilege, and my understanding is that
15 because HIPAA has a Court Order out to it that that
16 procedure did not violate HIPAA, but that was all I was
17 focused on, I wasn't focused on the privilege.

18 MR. FENNEL: That procedure, it will
19 address any concerns that the Court has about the HIPAA
03:13PM 20 concerns, but I think it also will address any concerns
21 the Court would have about the patient-physician
22 privilege. The information that is being requested is
23 necessary for the plaintiffs' steering committee to
24 obtain so that we can help identify all of the
25 claimants, the potential claimants that are out there

1 before they lose their rights pursuant to some bar date
2 that might be imposed, so those concerns about the
3 patient privilege, the patient physician privilege will
4 be protected in the same manner that the HIPAA concerns
5 will be protected.

6 If your Honor would like, the plaintiffs'
7 steering committee would be happy to submit a
8 supplemental brief on that issue by this coming Tuesday.

9 THE COURT: Mr. Gottfried, does the trustee
03:14PM 10 have a position on this?

11 MR. GOTTFRIED: We don't have a position
12 with respect to the subpoenas and the specific questions
13 that the Court has raised with respect to that issue.
14 We do think that the issue of notice under the bar date
15 is something that would be taken up by Judge Boroff next
16 week, and we think that's the appropriate place for that
17 to occur.

18 THE COURT: What powers does he have as a
19 bankruptcy court, putting aside the centralized
03:15PM 20 enforcement issue? In other words, does he have the
21 power as a bankruptcy judge to undertake discovery, I
22 guess, to provide appropriate notice to affected
23 parties?

24 MR. GOTTFRIED: Well, I brought my
25 bankruptcy partner wingman here with me, and I'll let

1 him answer that question, Attorney Sternklar.

2 THE COURT: All right.

3 MR. STERNKLAR: Thank you, your Honor,
4 Attorney Jeffrey Sternklar.

5 THE COURT: Why don't you remain seated and
6 speak into the mic.

7 MR. STERNKLAR: Thank you, your Honor. The
8 answer to your question is yes, Judge Boroff clearly has
9 the power under a variety of rules and provisions of the
03:15PM 10 bankrupt code to obtain whatever information he wants.
11 We should note, your Honor, on the bar date motion that
12 is on for hearing before Judge Boroff next week, we have
13 specifically and directly addressed the issue of how we
14 give notice both to known and unknown creditors, and
15 your observation we believe is correct.

16 The law in bankruptcy is that the Courts
17 make a distinction between known and unknown creditors.
18 The leading case in the First Circuit on that point is
19 the *Arch Wireless* case, and what the Court says is a
03:16PM 20 known creditor is a creditor that is either known or
21 reasonably ascertainable, and it goes on to explain that
22 a reasonably ascertainable creditor is one who appears
23 from review of the books and records of the debtor,
24 which in this case is New England Compounding.

25 There are a number of cases, not so much in

1 the First Circuit but in the Third Circuit, the *Chemtron*
2 case, and in the Fifth Circuit, that make clear that the
3 test is whether the identity is ascertainable from the
4 books and records, not that it's discoverable or not
5 that the claim itself is foreseeable but whether the
6 actual identity by looking at the books and records is
7 ascertainable. In those circumstances, you have to give
8 some other notice, constructive notice by publication or
9 otherwise.

03:17PM

10 Now, Judge Boroff, we have proposed in our
11 bar date motion a method of giving publication notice.
12 Judge Boroff in prior hearings has sort of forecast that
13 there are some specific changes he wants made to that
14 that we are prepared to make. He apparently believes
15 people do read local and state papers and wants us to
16 provide publication notice more broadly than we
17 proposed, and we're prepared to do that.

03:18PM

18 With respect to your question about the
19 power, your Honor, the Court has the power with respect
20 to notice under Bankruptcy Rule 2002(a)(7). That rule
21 specifically provides that, and I'll read it in
22 pertinent part. There's a lot of stuff that's not
23 pertinent here.

24 It says, "The clerk," meaning the bankruptcy
25 clerk, "or some other person, as the Court may direct,

1 give a number of parties, including all creditors, at
2 least 21 days' notice by mail of," and Subsection 7 then
3 says, "The time fixed for filing proofs of claim
4 pursuant to another rule."

5 The Court clearly has the power to require
6 that notice to be given. If those names are not
7 ascertainable, there is another rule in the bankruptcy,
8 Rule 2004, that permits a party to take discovery, if
9 you will, even though there's no lawsuit pending.

03:19PM

10 The courts have literally said that with
11 respect to issues relating to debtor and its financial
12 affairs, that that is, and this is a quote, "a fishing
13 expedition." It's a very, very, broad power to conduct
14 discovery far beyond the Rule 26 limits that apply in
15 civil discovery under the Federal Rules of Civil
16 Procedure.

03:19PM

17 So one way we propose to deal with that,
18 we've got a proposal in our motion whereby we're going
19 to request of some of these clinics. Actually we're
20 going to ask Judge Boroff to order that these clinics
21 make an election. They either give the notice
22 themselves to those people we don't know that they gave,
23 administered some of the product from at least the three
24 contaminated lots that the CDC has identified caused
25 harm, or if they don't want to give the notice, simply

1 turn over the names and contact information to us and to
2 our noticing agent, Donnell, McConnell & Company (ph),
3 who in a HIPAA-compliant way will provide notice to
4 those parties in lieu of having the clinics provide
5 them.

6 And we've briefed, at least in a summary
7 form, our motion to law in which we believe Judge Boroff
8 is empowered to enter such an order. So that's the
9 minimum, and Judge Boroff certainly has the power to do
10 that.

03:20PM

11 Now, we have made clear that we share at
12 least the goal of getting as broad a notice as possible,
13 of actual notice as possible out to as many people as we
14 can, and we have been in discussions with at least as
15 many people as we can who we can identify have been
16 administered the tainted product that has caused harm.

17 We've consulted both with the creditors'
18 committee, Mr. Molton and his group, with Mr. Sobol and
19 his group where they want more, and we're not resisting
20 everything they want. We're trying to work out some of
21 the details.

03:21PM

22 We obviously only have limited funds to use
23 to provide notice. We can spend a lot of money getting
24 the last two or three percent of people notice who may
25 not otherwise get notice, and we want to be careful that

03:22PM

1 we not spend inordinate amounts of money trying to do
2 that, and I think that the prospects are good that for
3 the most part, we will reach accommodation with the
4 different committees. To the extent there are issues
5 about the bar date in bankruptcy, a creature of the
6 bankruptcy rules, Rule 3003(c) is what requires the
7 Court to set a bar date for claims in the Chapter 11
8 case and issues about notice of that bar date, then in
9 response to your question, there are numerous provisions
10 of the bankruptcy rules and the bankruptcy code that
11 authorize and empower Judge Boroff to enter the
12 appropriate orders to give notice that complies with due
13 process, and as noted, will endeavor to the extent
14 there's more than the minimum required to do within
15 reason, we hope to do it.

03:23PM

16 I think we've made a lot of progress on
17 that. I think, as Mr. Sobol indicated, there's still
18 some issues outstanding, and if we can't resolve them
19 all, then Judge Boroff will be prepared to decide them
20 next week. Thank you, your Honor.

21 THE COURT: What about the suggestion that I
22 would have the power to withdraw the reference to the
23 bankruptcy court for the limited purpose of dealing with
24 these notice issues? Does that work?

25 MR. STERNKLAR: No, your Honor. Well, I

1 don't think --

2 THE COURT: Does it work legally?

3 MR. STERNKLAR: Legally?

4 THE COURT: Yes.

5 MR. STERNKLAR: You can withdraw the
6 reference, if you wish, your Honor, that's up to you, if
7 the conditions for withdrawal of the reference exist,
8 then there's various standards if a motion is made to
9 withdraw the reference that have to be met.

03:23PM 10 I would submit it would be extremely
11 disruptive to our ability to administer this bankruptcy
12 estate if we start doing this piecemeal and you start
13 taking pieces here, pieces there.

14 As your Honor may recall from the 28 U.S.C.,
15 157 that governs, part of what governs what the
16 bankruptcy court has the power to hear and determine,
17 there are core proceedings and non-core proceedings.
18 Core proceedings, the courts have substantially greater
19 powers to enter final orders and judgments than they do
03:24PM 20 as to non-core proceedings, the bankruptcy courts, at
21 least, and this is about as core of a proceeding as one
22 can get, setting a bar date under a bankruptcy rule for
23 the submission of claims that will be subject to
24 allowance or disallowance under the bankruptcy code,
25 have consequences potentially for voting under a plan of

1 reorganization, and I can't think of something that
2 would be more disruptive at this point if your Honor
3 were to withdraw the reference for one piece of this
4 than the other.

5 There's no suggestion, nor is there any real
6 good faith argument that Judge Boroff can't or won't
7 handle this appropriately, as he's done regularly in
8 these cases, and as we expect he'll do on Wednesday.

9 THE COURT: I think I heard you say that
03:25PM 10 Judge Boroff would have the power to, for example,
11 direct let's say a pain clinic in Virginia to either
12 provide the notice or provide the names so that the
13 Court can provide notice. Is that correct?

14 I mean, in other words, could he issue an
15 enforceable order, let's say a pain clinic in Roanoke,
16 Virginia, I want you to give notice to the patients,
17 according to your records, who received any of these
18 medications and report back to me that you've done that,
19 otherwise I want the names. Does he have the power to
03:25PM 20 do that?

21 MR. STERNKLAR: Your Honor, I believe he
22 does. The plain language of Rule 2002(a) is that the
23 clerk "or some other person as the Court may direct" has
24 to give the notice. "Person" is a defined term under
25 the bankruptcy code that would include the pain clinics

1 and the other what we call notice intermediaries in our
2 motion. I don't know of any basis on which one could
3 read that out of the rule and say that he doesn't have
4 the power to direct other persons.

5 THE COURT: That's nationwide power as well,
6 right?

7 MR. STERNKLAR: Yes, your Honor, under the
8 bankruptcy code, I believe the Supreme Court, certainly
9 the First Court has held that for purposes of personal
10 jurisdiction, minimum contacts do not have to do with
11 the forum state but rather with the United States, so
12 it's nationwide personal jurisdiction.

13 THE COURT: All right. Mr. Fennell,
14 Mr. Sobol, do you want to respond to that?

15 MR. SOBOL: I do, your Honor. First taking
16 that last issue and then working backwards. Speaking
17 candidly, the discussion that led to us approaching the
18 clinics in the way that we have through the subpoena
19 power of this Court was the determination from

20 Paul Moore, the trustee's counsel, that the more
21 efficient and better way to do this was not through the
22 fishing expedition powers of the bankruptcy court but
23 instead through this Court's subpoena power and its
24 ability to have central enforcement.

25 THE COURT: Why is one a fishing expedition

1 and not the other? It wouldn't essentially be the same
2 thing.

3 MR. SOBOL: Well, I used that expression
4 simply because in that context, in the bankruptcy rules,
5 they sort of call it and use that expression, but it's
6 really not important for these purposes.

7 THE COURT: But it seems to me that
8 argument, for better, for worse applies equally to what
9 I would do. I mean, you know, if that's a fishing
10 expedition, this is, too.

03:27PM

11 MR. SOBOL: Fair. Then the other thing
12 about whether or not the bankruptcy court has the power
13 to insist that a clinic then issue, you know, that the
14 clinic provide notice is problematic for a variety of
15 reasons. First, I think there is a genuine question
16 about whether or not clinics, they haven't even filed
17 the claim in the bankruptcy court, think that they could
18 be ordered as to what it is they can do by the
19 Bankruptcy Court Judge, Number 1.

03:28PM

20 My understanding is that as a result of the
21 filing of the bar date motion, some clinics have already
22 said you don't have the power to require us to do that.
23 It's also problematic for two other really --

24 THE COURT: You understand, I don't have the
25 power, I mean --

1 MR. SOBOL: It doesn't mean that you don't
2 have the power through the issuance of a subpoena, which
3 is what we've done, and its court process, which is why
4 we've gone through this, to make clear that there is the
5 power of the Court and there's court process.

6 THE COURT: But my power is limited by
7 Rule 26.

8 MR. SOBOL: Well, and Rule 45.

9 THE COURT: And Rule 45.

03:28PM

10 MR. SOBOL: I'll turn to in a little bit the
11 withdrawal of the reference issue. It's also
12 impractical though because there's no ability to monitor
13 compliance with whether or not the clinic has really
14 done it or not.

15 For example, it's the case often that when
16 you send out a mailing, you get a lot of letters back,
17 we don't know where the person went, that kind of thing.
18 There's been some experience here even that when the CDC
19 letters went out and clinics were supposed to send out
20 letters, that they got returned mail of a large quantity
21 or returned things, and then so are you going to do what
22 you need to do to make sure you get real notice to
23 people but then also you don't have a track record of
24 knowing who it is you're trying to contact.

03:29PM

25 One thing the PSC would likely do if we had

1 the names and are making sure that people are contacted
2 is if somebody hasn't filed a claim that there could be
3 a way to do a follow-up telephone bank or a follow-up
4 mailing to make sure that the people do have. So
5 there's some practical considerations as well.

6 There's also a really fundamental practical
7 issue, which is this: It's a little bit nuance, but I
8 have to describe it. What we contemplate in this case,
9 your Honor, is that eventually the clinics will
03:30PM 10 participate in the eventual plan of reorganization and
11 that the clinics, therefore, will have channeling
12 injunctions and will be, for all practical purposes,
13 released.

14 Now, if a person now gets a notice and does
15 not file a claim here, it may be that their rights
16 against the clinic, too, eventually will be functionally
17 released through channeling injunctions and the rest.
18 So the position of the PSC has been that you have to at
19 this time or later make sure that people know that their
03:30PM 20 rights against the clinics are going to be wiped out.

21 Now, are we going to be have the clinics
22 under some emorpheus obligation sending notices that
23 can't be monitored and can't be followed up, and those
24 notices make clear to people you might have a right to
25 sue your clinic? I mean, it ends up being a situation

1 where it's not a practical way to go about doing things.

2 Now, I will say there is, because of this
3 situation where you have precisely the conundrum in
4 front of you, which is should this Court Judge be
5 dealing with this, or should Judge Boroff be dealing
6 with this? If you struggle with that power issue at
7 all, this is not a new issue in a mass tort bankruptcy
8 context.

9 There are other situations in mass tort
03:31PM 10 bankruptcies where right out of the gate, the
11 Article III Judge withdraws the reference for purposes
12 of the bar date, hearing the notice procedures, content
13 of notice and even planned confirmation, you know,
14 whether it's in the Babcock bankruptcy case or the Dow
15 Corning bankruptcy case, and I think that if you go into
16 there's an article about how it is that -- sorry.

17 Yes, the *H.A. Robbins* case, there are many
18 examples where the reference is withdrawn in a mass tort
19 because the Article III Judge is better equipped and is
03:32PM 20 more efficient because you deal with it once and once
21 only.

22 THE COURT: I cannot imagine that I'm better
23 equipped than Judge Boroff to do things like confirm
24 a --

25 MR. SOBOL: Well, it's one --

1 THE COURT: There's no possibility that
2 that's true.

3 MR. SOBOL: -- stop shopping. Right now you
4 have 82 issued subpoenas. Judge Boroff doesn't have
5 any.

6 THE COURT: All right. Is there anyone
7 present for a third-party subpoena recipient who wants
8 to be heard? I know there are people on the phone.
9 Anyone physically present in the courtroom? Yes, sir,
10 please come up to the podium.

03:32PM

11 MR. TARDIO: For the record, again,
12 Chris Tardio here on behalf of five Tennessee non-party
13 recipients of subpoenas, and these legal issues have
14 been covered in the discussion that the Court has
15 leveled over the last few minutes, but one thing that I
16 don't know if the Court wants to address it now or later
17 when we talk more specifically about the breadth of the
18 subpoenas.

03:33PM

19 As I understand the bar date motion, and as
20 I understand the subpoenas that have been issued, the
21 breadth expands the universe of patients expected to be
22 noticed or listed by these clinics beyond those patients
23 who received just the MPA, and as we know the CDC --

24 THE COURT: Let me cut to the chase on this.
25 I intend to resolve this broad issue of can we do this

1 at all? I'm going to give the details to the magistrate
2 judge, the breadth of a particular subpoena as applied,
3 and I should note that the subpoenas, as I understand
4 it, seek information beyond individual patient names,
5 what I'll call business-type records, insurance
6 policies, sales of NEC products and so forth. I'm going
7 to give all of that to the magistrate judge.

8 I don't want to struggle through all 33
9 objections and 82 subpoenas. I'm going to let her
03:34PM 10 wrestle with that, but I want to decide this broader
11 issue up front, and one way or another, she'll get what
12 remains. That's my intention of how to proceed here.

13 MR. TARDIO: Fair enough, your Honor. I
14 think from my perspective, the legal issues have been
15 discussed sufficiently.

16 THE COURT: All right. I'm going to go down
17 the list of people who have indicated on the phone that
18 they may want to be heard. Again, if you have something
19 to add that is not duplicative, I'll give you that
03:34PM 20 opportunity. What I'm going to do rather than resolve
21 it now is I'm going to take up the plaintiffs on their
22 suggestion to have supplemental memoranda filed by next
23 Tuesday, and I'll give any party or third-party an
24 opportunity to do that, to supplement the briefs in
25 light of the discussion today, but let me go down the

1 list.

2 Mr. Wolk from New Jersey, do you want to be
3 heard on this?

4 (No response)

5 THE COURT: I don't hear a response.

6 Mr. Brock or Mr. Bennett from Tennessee, do you want to
7 be heard?

8 (No response)

9 THE COURT: I don't hear a response.

03:35PM 10 Mr. Myers from South Carolina, do you wish to be heard?

11 (No response)

12 THE COURT: We're not mooted, are we?

13 Mr. Grossman from New Jersey?

14 (No response)

15 THE COURT: No response. Ms. Humphrey from
16 Michigan?

17 (No response)

18 THE COURT: Mr. Shaw from D.C.?

19 (No response)

03:35PM 20 THE COURT: Ms. Stevens from Florida?

21 (No response)

22 THE COURT: Mr. Bozer from New York?

23 (No response)

24 THE COURT: I think that's it. Anyone else
25 on the telephone who wishes to be heard on this issue?

1 (No response)

2 THE COURT: All right. Let me --

3 MR. MOLTON: Your Honor --

4 THE COURT: Yes.

5 MR. MOLTON: -- just with respect to I
6 didn't have an opportunity to weigh in.

7 THE COURT: I'm sorry, go ahead.

8 MR. MOLTON: David Molton for the committee.

03:36PM

9 We didn't take any position, vis-à-vis the subpoenas. I
10 just want to set the committee's position with respect
11 to three points. Number 1, without reiterating what
12 trustee's counsel said, we fully agree that the
13 bankruptcy court has the power to do what Mr. Sternklar
14 said, has full authority and power under the bankruptcy
15 code and has full nationwide jurisdiction. This is
16 things that bankruptcy courts do all the time.

17 We think that the two courts have been
18 operating quite efficiently dealing with their
19 respective duties, and we agree that with piecemeal
20 withdrawal of the reference, especially in connection
21 with something that is core as core can be as bar date
22 would not benefit the efficient administration of the
23 bankruptcy estate.

03:37PM

24 And Number 3, a lot of the argument that you
25 heard today, your Honor, will be undertaken and is being

1 briefed and will be dealt with by Judge Boroff next
2 Wednesday with full opportunity for all counsel to be
3 heard, you know, and for him to make a decision based on
4 applicable law, and hopefully the various parties will
5 come to agreement to provide not just minimal
6 constitutionally sufficient notice, but as Mr. Sternklar
7 said, the trustee has announced his intent to go beyond
8 that and to work with the two committees to provide
9 notice that goes beyond what's just constitutionally
10 necessary to make it adequate for the circumstances of
11 this case, so I just wanted the committee's position to
12 be known.

03:38PM

13 THE COURT: All right. Just to clarify, the
14 briefing, supplemental briefing by next Tuesday, I would
15 like counsel to address the question of
16 physician-patient privilege and how that may be affected
17 here. It's not clear to me how that issue is resolved,
18 and I understand why this is desirable, why it's
19 practical, why it works better than any other solution.

03:38PM

20 That's not my immediate concern, my
21 immediate concern is whether it is legally permissible
22 for me to do this when the recipients of the subpoena
23 object. At the risk of sounding old-fashioned, I'm
24 going to do what the law permits me to do and limit
25 myself to that, and if as a result the notice is

1 imperfect, then the notice is imperfect if the law
2 doesn't permit me to go farther, but I need to be
3 persuaded that I have this power or that it makes sense
4 for me to exercise this power rather than having the
5 bankruptcy court exercise it.

6 In the meantime, all of the various
7 objections and motions to quash to the extent they
8 haven't been resolved voluntarily will remain pending.
9 There were 33 at last count. I don't know how many
03:39PM 10 there are at present -- apparently Attorney Bozer, can
11 you hear me?

12 MR. BOZER: Yes, your Honor.

13 THE COURT: You wanted to speak, and
14 apparently you had trouble being heard?

15 MR. BOZER: Your Honor, I had Peter's e-mail
16 on my desktop. There are a number of people on the
17 system I heard trying to respond to your Honor, and I
18 wanted to alert Peter of that fact.

19 THE COURT: Okay.

03:40PM 20 MR. BOZER: I myself am satisfied that the
21 arguments have been presented.

22 THE COURT: At the risk of opening this up,
23 if anyone wants to be heard, identify yourself and
24 speak. Anybody from New Jersey?

25 MR. GROSSMAN: Thank you, your Honor. This

1 is Steve Grossman. Hopefully you can hear us at this
2 point.

3 THE COURT: Yes, yes.

4 MR. GROSSMAN: The one issue I wanted to
5 raise with respect to of notice is that the very issue
6 of the scope and the notice that's being discussed today
7 is obviously pending before the bankruptcy court as part
8 of that bar date motion. We were hoping to have
9 guidance on that yesterday, as many pointed out, but, of
10 course, that's been adjourned.

03:40PM

11 Our concern, and although I think you've
12 just ruled that these will be held in abeyance, one of
13 the things we did want to say is that the decision made
14 today obviously could have a broad impact on the notice
15 requirements that will be imposed on the debtor and the
16 bankruptcy and which would affect to the extent that
17 scope goes beyond the particular three lots at issue
18 would impact a number of patients and certainly various
19 medical centers, and as such we were going to suggest to
20 the Court that your Honor consider deferring that
21 decision on the scope of discovery until the bankruptcy
22 judge determines the scope of who needs to receive
23 actual notice in the context of the bar date motion.

03:41PM

24 THE COURT: All right. Anyone else from
25 New Jersey? Anyone from Tennessee? Like the Miss

1 America contest here.

2 [Laughter]

3 THE COURT: North Carolina?

4 COUNSEL FROM NORTH CAROLINA: Your Honor,
5 we're fine.

6 THE COURT: Michigan?

7 MS. HUMPHREY: Yes, your Honor, this is
8 Kathryn Humphrey. Can you hear me, sir?

9 THE COURT: Yes.

03:41PM 10 MS. HUMPHREY: I simply wanted to point out
11 two things in response to the three points that the
12 plaintiffs' steering committee lawyer made in support of
13 this Court permitting him to issue subpoenas and gain
14 this kind of patient information through that route.
15 The first is that he said it ought to be done not by the
16 clinics and the hospitals because there will be
17 follow-up that's necessary, letters get returned as
18 undelivered, et cetera.

19 Assuming that someone is going to need to do
03:42PM 20 that follow-up, it can be done by whomever the Court
21 requires it to be done by, and as the Court probably
22 knows, there has already been a notice procedure because
23 of the recall, and in the instance of my client, they
24 were in contact with each of their patients, and they
25 knew who they were and how to contact them, and I think

1 that is much more the rule than the exception.

2 The second point I want to make is to his
3 point about are we going to have the clinics notifying
4 their own patients that they may want, they may wish not
5 to waive rights against the clinic, and the point I want
6 to say here is simply that the text of the notice that
7 can be provided by the clinics themselves in order to
8 protect the patient privilege, the patient physician
9 privilege, the text of that notice I fully expect would
03:43PM 10 be dictated by the bankruptcy court or you under
11 different circumstances and that whatever text is,
12 whatever is required to be told to the patients, a Court
13 is going to tell us what that text is, and that need not
14 be -- that is not an objection that carries any weight
15 weighing in favor of the plaintiffs' steering committee
16 as opposed to the clinics. Thank you, sir.

17 THE COURT: District of Columbia?

18 (No response)

19 THE COURT: Florida?

03:44PM 20 COUNSEL FROM FLORIDA: No, your Honor, thank
21 you.

22 THE COURT: Thank you. Anything else on
23 that issue that I've failed to take up? Again, there
24 are other issues that may need to be resolved, as I
25 indicated, what I'll call the business information-type

1 issues I'm clearly going to refer to the magistrate
2 judge, but for the time being, I'm going to wait for the
3 further briefing and make a decision on this larger
4 issue.

5 MR. STERNKLAR: Your Honor --

6 THE COURT: Yes.

7 MR. STERNKLAR: -- Jeffrey Sternklar again,
8 a couple points. One, as related to by counsel from I
9 believe Michigan just spoke, among the things we're
03:45PM 10 asking Judge Boroff to approve is the form of the
11 notice.

12 Second, I would echo the suggestion and make
13 it even broader of I forget the gentleman who made it on
14 the phone, his name, but that it might be very helpful
15 when we're briefing these issues to know what
16 Judge Boroff has decided, so might I suggest that rather
17 than having the brief due Tuesday, you set the deadline
18 for the briefing for a date after Wednesday, a couple
19 days at least after Wednesday, so we have the benefit of
03:45PM 20 Judge Boroff's ruling in hand when we're submitting
21 things to you that might be impacted by that?

22 Certainly one of the other reasons that
23 comes to mind is because, you know, we put this hearing
24 off before Judge Boroff for one week. I understand it
25 was done so in part based on the agreement of --

1 [Audio feedback]

2 THE COURT: There's one small step for a
3 man, that sounds like.

4 MR. STERNKLAR: It's a giant leap, your
5 Honor, but I understand it was in part based on the
6 agreement more of the trustee and Mr. Sobol that they
7 expand the week trying to work this out, but then
8 ultimately Judge Boroff, they agreed, is the proper
9 party to decide this, so it's somewhat anomalous when we
03:46PM 10 hear now that there's some discussion of maybe
11 withdrawing the reference to take that motion on for
12 Wednesday and bring it to this Court.

13 Finally, your Honor, just a question of
14 clarity. I want to understand precisely what it is you
15 want briefed. We understand the issue of the privilege.
16 When you get into the question of whether you have the
17 power to issue these subpoenas, are you asking for
18 briefing whether you have the power under Rule 26, or
19 are you going father and asking us to brief whether you
03:47PM 20 can or should withdraw the reference?

21 If it's the latter, I might suggest, your
22 Honor, we await a formal motion to withdraw the
23 reference so we know we have a clear target to shoot at
24 rather than talk in some abstract fashion.

25 THE COURT: Why don't we put the issue of

1 withdrawing the reference on hold for the time being. I
2 think that's kind of a radical proposal, so to speak,
3 and I'm not prepared to do it without further briefing
4 and consideration. It's an opportunity for supplemental
5 briefing. I think I've hopefully expressed my concerns
6 here. I'll let people react as they wish. You can file
7 nothing, you can file what you think is appropriate.

8 I do tend to be influenced by things like
9 cases and statutes, and, you know, I made clear I'm
03:48PM 10 concerned about my legal authority to do this,
11 particularly in the context of privileged information.
12 It may be that there's some shining authority out there
13 that clears it all up for me.

14 I do think it makes sense to wait till after
15 Wednesday for the hearing before Judge Boroff which will
16 also give everyone else a little more time to reflect on
17 this. Why don't I make it Friday, the 26th, for
18 supplemental briefing unless someone thinks this is more
19 urgent than that, and we'll handle it that way.

03:48PM 20 And, again, I don't think we need to take up
21 the issue of this partial withdrawal completely,
22 complete withdrawal of the reference at this stage. It
23 will take a lot of work to convince me that I would do a
24 better job at that than Judge Boroff. That's a hill
25 that's too steep to climb I think probably, but, in any

1 event, let's see how that goes.

2 MR. SOBOL: If I may, your Honor?

3 THE COURT: Yes.

4 MR. SOBOL: Just to respond to

5 Mr. Gottfried's comments regarding withdrawal of the

6 reference, I have a very explicit agreement with

7 Mr. Moore that I was not going to move to withdraw the

8 reference, and I haven't.

9 What I was responding to, however, was

03:49PM 10 Mr. Gottfried's argument that when expounding on what he

11 perceives to be the powers of the bankruptcy court that

12 implicitly does not, and I don't think that's the law,

13 nor do I think that the plan all along had been

14 explicitly with the trustee, that the PSC would spend

15 hundreds of hours issuing subpoenas to 80 clinics to be

16 able to make sure that we get affected notice to these

17 injured people and then for the trustee's position

18 implicitly before this Court to be that it's all been a

19 waste of time, and I've been disappointed by that,

03:50PM 20 frankly.

21 THE COURT: Well, I don't know that that

22 requires a response from me. I, the Judge, am concerned

23 about my legal authority. At least some of the

24 recipients of the subpoenas have briefed this quite

25 capably and raised concerns that had not occurred to me,

1 and I want to make sure I understand those issues before
2 fully we go further, and --

3 MR. SOBOL: And that will be briefed by the
4 26th?

5 THE COURT: That will be any supplemental
6 briefing will be done by the 26th, and we'll see where
7 we are at that point. All right. Does that exhaust the
8 agenda? Is there anything else anyone wants to take up?
9 I want to set a date for I guess into October, November,
10 whatever, to keep setting dates in the future for the
11 status.

12 The suggestion has been passed onto by me
13 Mr. Cicolini that some people would prefer that these
14 start a little earlier in order to accommodate people's
15 flight schedules if you're coming here for the day.

16 Does anyone have a view on that? I do
17 function better when I've had a sandwich. I don't want
18 to skip lunch altogether. We can do it at 1:30 or 1:00.
19 I'm not sure I care as long as -- if I have a trial that
20 morning, I'm going to go to 1:00, and I'm going to need
21 a window of time, but they don't have to be at 2:00.
22 Does anyone have a view? Yes? No?

23 MR. MORIARTY: Your Honor, I'm the one who
24 raised the point just because these agendas get longer
25 and more meaty, they do take some time, and, you know,

1 it's one thing if you come in the night before and are
2 prepared to start at nine or ten in the morning and then
3 have a leisurely way to get out as opposed to if you
4 have to leave the courthouse at five and rush to the
5 airport and miss a plane. Even 30 minutes sometimes
6 helps.

7 THE COURT: Why don't we do this. Let's
8 schedule them for 1:30. Peter, can I do that on
9 August 9th?

03:52PM

10 THE CLERK: Sure.

11 THE COURT: Unless that fouls anyone up, why
12 don't we make it 1:30 on August 9th. What was our
13 September?

14 THE CLERK: September 12th.

15 THE COURT: September 12th?

16 THE CLERK: Yes.

17 THE COURT: Do you want to make that 1:30 as
18 well. We can look at this and even make it earlier.

03:53PM

19 That part of being a lawyer I remember, trying to get
20 out of town onto an airplane, sitting on the tarmac at
21 Laguardia waiting for the shuttle to take off, I
22 understand that part of the practice. Let's get a date
23 in October.

24 THE CLERK: October 8th, we can do 1:30, we
25 can do the morning.

1 THE COURT: Tuesday, October 8th, we could
2 make that why don't we call it 1:30. Again, I
3 understand that not everyone's going to be able to make
4 every date. I don't have any problem at all with
5 hearing from your law partners or associates, as the
6 case may be. I understand that you can't all
7 necessarily attend every hearing.

8 All right. Anything else we need to take
9 up? Anything from the PSC? Mr. Sobol? Ms. Parker?

03:54PM

10 MR. SOBOL: No, your Honor.

11 THE COURT: The trustee?

12 MR. GOTTFRIED: No, your Honor.

13 Creditors' committee?

14 MR. MOLTON: No, your Honor.

15 THE COURT: Defendants?

16 MR. FERN: No issue, Judge.

17 THE COURT: Anybody else? Okay. Thank you,
18 all have a good trip back, and we'll see you in about a
19 month.

03:54PM

20 (Whereupon, the hearing was adjourned at
21 3:54 p.m.)
22
23
24
25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing
transcript, Pages 1 through 35 inclusive, was recorded
by me stenographically at the time and place aforesaid
in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING
PHARMACY CASES LITIGATION and thereafter by me reduced
to typewriting and is a true and accurate record of the
proceedings.

Dated this July 22, 2013.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER